No. 22-1071

In The
Supreme Court of the United States

WASHINGTON ALLIANCE
OF TECHNOLOGY WORKERS,

Petitioner,

v.

UNITED STATES DEPARTMENT
OF HOMELAND SECURITY, ET AL.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

BRIEF OF ATLANTIC LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes & Regulations

Other Authorities

INTEREST OF THE *AMICUS CURIAE* [1]

Established in 1977, the Atlantic Legal Foundation (ALF) is a national, nonprofit, nonpartisan, public interest law firm whose mission is to advance the rule of law and civil justice by advocating for individual liberty, free enterprise, property rights, limited and responsible government, sound science in judicial and regulatory proceedings, and effective education, including parental rights and school choice. With the benefit of guidance from the distinguished legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists who serve on its Board of Directors and Advisory Council, ALF pursues its mission by participating as *amicus curiae* in carefully selected appeals before the Supreme Court, federal courts of appeals, and state supreme courts. *See* atlanticlegal.org.

* * *

As a long-time advocate for free enterprise, effective education, and sound science, ALF recognizes the real-world significance of the statutory interpretation issue presented by this case—whether the Immigration and Nationality Act (INA) authorizes the Department of Homeland Security (DHS) to create and operate a "Post-Completion" Optional Practical Training ("OPT") program that allows holders of "F-1"

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[1] All parties' counsel have been provided the advance notice required by Supreme Court Rule 37.2(a). No counsel for a party authored this brief in whole or part, and no party or counsel other than the *amicus curiae,* its counsel, and its supporters made a monetary contribution intended to fund preparation or submission of this brief.

nonimmigrant student visas to stay and work in the United States (currently up to 3 years) after receiving a university-level Science, Technology, Engineering, or Mathematics ("STEM") degree. Although ALF takes no position on the merits, we urge the Court to address this important question. Its resolution will directly affect, one way or another, the size, composition, and permanence of the nation's crucial, high-technology workforce, and thus, the national, and even global, economy. Given the intense, technology-related competition that the United States continuously faces from foreign adversaries, robust employment in the technology sector also is a matter of long-term national security.

The D.C. Circuit's 2 to 1 holding that the INA vests DHS with almost unlimited authority to decide how long, and under what conditions, millions of nonimmigrant aliens of *all* types can "temporarily" live and work in the United States has far-reaching economic, social, and other domestic and foreign policy implications even beyond the STEM OPT program at issue here. As a steadfast advocate for limited and responsible government, and for adherence to the separation of powers, ALF believes that the question of whether Congress has delegated such sweeping regulatory power to DHS warrants this Court's scrutiny through the lens of the major questions doctrine.

SUMMARY OF ARGUMENT

This long-running litigation brought by Petitioner Washington Alliance of Technology Workers (commonly referred to as "Washtech") challenges DHS's authority to establish, by regulation, the ongoing, Post-Completion OPT program for F-1 STEM students. *See* 8 C.F.R. § 214.2(f)(10)(ii) ("Optional practical training"); 81 Fed. Reg. 13,040 (Mar. 11, 2016); DHS, F-1 Optional Practical Training (OPT).[2] Under this DHS-created guest worker program and its 2016 "STEM extension," F-1 student visa holders can stay and work in the United States up to 3 years after receiving their degrees. *See* 81 Fed. Reg. at 13,087 ("The 24-month extension, when combined with the 12 months of initial post-completion OPT, allows qualifying STEM students up to 36 months of practical training.").

The validity of Post-Completion STEM OPT is vitally important not only because this DHS regulatory program benefits a multitude of F-1 students and their U.S. employers, but also because it significantly increases the competition for technology sector employment between highly educated American professionals and nonimmigrant aliens.

The D.C. Circuit's majority opinion, authored by Circuit Judge Pillard, categorically construes the INA's detailed statutory definitions of numerous classes of nonimmigrant aliens, including but not limited to F-1 students, as merely establishing requirements for *entering* the United States.

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[2] https://tinyurl.com/2z7hjzuk (last updated July 21, 2022).

See 8 U.S.C. §§ 1101(a)(15)(A)–(V). The majority opinion contends that a different INA provision, 8 U.S.C. § 1184(a)(1), vests DHS with broad authority to promulgate regulations setting the "time" that F-1 students and other classes of nonimmigrant aliens can stay in the United States, and the "conditions" under which they may work during their stays.

But D.C. Circuit Judge Henderson's dissenting panel opinion, and D.C. Circuit Judge Rao's dissent from denial of rehearing en banc, present a starkly different statutory interpretation. In their view, the INA's definitions of various categories of nonimmigrant aliens are not merely entry requirements, but also establish the conditions under which they can stay, and possibly work, in the United States. The dissenting judges argue that the statutory conditions governing F-1 students, 8 U.S.C. § 1101(a)(15)(F)(i), do not authorize them to work in the United States after completing their course of study. They further contend, contrary to the majority opinion, that § 1184(a)(1) does not vest DHS with regulatory authority independent of § 1101(a)(15).

This Court's review is needed given the broad practical importance of the question presented, the breadth and potential ramifications of the majority opinion's interpretation of the INA nonimmigrant alien provisions, the dissenting judges' contrary views, and the major policy-related decisions underlying the STEM OPT program. Indeed, this is a "major questions" case. The majority opinion's seeming inconsistency with this Court's INA precedents, and the circuit split that the majority opinion has created,

are additional compelling reasons why the Court should grant certiorari.

ARGUMENT

The Court Should Decide Whether the Immigration and Nationality Act Vests DHS With Independent Authority To Determine How Long, and Under What Conditions, Nonimmigrant Aliens Can Work Or Stay In The United States

A. Sharply conflicting interpretations of the INA necessitate this Court's review

There is no dispute that the INA establishes separate requirements for entry of numerous classes of nonimmigrant aliens into the United States. *See* 8 U.S.C. §§ 1101(a)(15)(A)–(V);[3] *Elkins v. Moreno*, 435 U.S. 647, 665 (1978) ("Although nonimmigrant aliens can generally be viewed as temporary visitors to the United States, the nonimmigrant classification is by no means homogeneous with respect to the terms on which a nonimmigrant enters the United States.").

For example, an "F-1" nonimmigrant student visa can be issued to "an alien having a residence in a foreign country which he has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study and who seeks to enter

[3] An "alien" is "any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3). An "immigrant" is "every alien except an alien who is within one of [the] classes of nonimmigrant aliens" defined in § 1101(a)(15). *Id.* § 1101(a)(15).

the United States temporarily and solely for the purpose of pursuing such a course of study . . . at an established college [or] university." 8 U.S.C. § 1101(a)(15)(F)(i).

The issue here is whether the INA's detailed definitions of various classes of nonimmigrant aliens—including F-1 students—merely establish requirements for *entry*, or whether they also govern the length of stay for nonimmigrants and the conditions under which they may work, if at all, while in the United States. The F-1 category, which expressly refers to nonimmigrant alien students who seek to enter the United States "*solely*" for the purpose of studying at an academic institution, says nothing about such students staying to work here after they receive their undergraduate or graduate degrees. *Id.*

The D.C. Circuit panel majority's opinion that DHS has broad "post-entry" regulatory authority over F-1 students and other categories of nonimmigrant aliens, coupled with two D.C. Circuit judges' emphatic dissenting opinions—Judge Henderson's dissenting panel opinion, Pet. App. 60a-87a, and Judge Rao's dissent (joined by Judge Henderson) from denial of rehearing en banc, *id.* 279a-286a—provide ample reason for this Court to grant certiorari. The need for review is underscored by the majority opinion's seeming conflict with long-standing Supreme Court precedent, and the split of authority that the majority opinion creates with other circuits concerning the scope of DHS regulatory authority over nonimmigrant aliens.

1. The panel majority held that § 1101(a)(15) merely "identifies entry conditions" for nonimmigrant aliens, and that a different INA provision, 8 U.S.C. § 1184(a)(1), vests DHA with authority "to set the 'time' and 'conditions' of nonimmigrants' stay in the United States," including the "power to authorize employment." Pet. App. 2a, 6a, 51a. Section 1184(a)(1) states in pertinent part that "[t]he admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as [DHS] may by regulations prescribe." According to the majority opinion, "Section 1184(a)(1)'s time-and-conditions provision is the source" of DHS authority for the "2016 Rule" that established the current Post-Completion STEM OPT program for F-1 students. *Id.* 23a; *see* 81 Fed. Reg. 13,040.

The majority opinion rejects Petitioner Washtech's argument

> that the statutory definition of the F-1 visa class precludes the Secretary [of DHS] from exercising the time-and-conditions authority to allow F-1 students to remain for school-recommended practical training after they complete their coursework. . . . [T]hat argument wrongly assumes that, beyond setting terms of entry, the visa definition itself precisely demarcates the time and conditions of the students' stay once they have entered. Congress gave that control to the Executive. The F-1 definition tethers the Executive's exercise

> of that control, but by its plain terms does not exhaustively delimit it.

Pet. App. 3a.

In the majority's view, "the INA thus defines categories of visa eligibility and empowers the Secretary [of DHS], guided by those visa categories, to regulate how long and under what conditions nonimmigrants may stay in the country." *Id.* 7a. According to the majority, "Washtech misreads F-1 to exhaustively delineate rather than inform and constrain the authority Congress separately conferred on the Executive to set the time and conditions of nonimmigrants' admission." *Id.* 40a. "Because the 2016 Rule regulates the 'time' and 'conditions' of admission for F-1 visa-holders, and because it is reasonably related to the distinct composition and purpose of that visa class, as defined in the F-1 provision, the Secretary had authority to promulgate it." *Id.* 23a.

The majority opinion also asserts that even if the INA is ambiguous as to the scope of DHS authority over nonimmigrant aliens after they enter the United States, "the statute may reasonably be understood as the Department has read it to support the 2016 Rule. . . . That interpretation thus merits . . . deference." *Id.* 55a (citing *Chevron U.S.A. v. Nat. Res. Def. Council,* 467 U.S. 837 (1984)).

2. Judge Henderson's dissent from the panel opinion focuses on "the F-1 statute," 8 U.S.C. § 1101(a)(15)(F)(i), "because the district court relied entirely on that provision to grant summary judgment

to the government." *Id.* 60a; *see also id.* 68a n.6 (Henderson, J., concurring in part and dissenting in part).[4] Her dissent parses the language of § 1101(a)(15)(F)(i) and concludes that it "plainly does not delegate the asserted authority" to DHS. *Id.* According to Judge Henderson, "[b]ecause the F-1 statute is plainly not an entry-only requirement, its constraints on nonimmigrant F-1 status are ongoing, making the DHS' 2016 OPT rule 'in excess of [its] . . . statutory authority.'" *Id.* 81a (quoting 5 U.S.C. § 706(2)(C)).

Applying the first step of the *Chevron* analytical framework, Judge Henderson's dissenting opinion contends that "[b]ecause the plain language of the F-1 statute is unambiguous, the inquiry should begin with the statutory text, and end there as well." *Id.* 69a-70a (cleaned up). Her opinion asserts that "[t]o support its entry-only-requirement interpretation, the DHS primarily relies . . . on absurdly overbroad interpretations of 'student' and 'course of study'"—terms used but not defined in § 1101(a)(15)(F)(i). *Id.* 73a. Pointing to the F-1 provision's text—which refers to "a bona fide student" and "requires an F-1 visa holder to be, *inter alia*, 'an alien who seeks to enter the United States temporarily and *solely* for the purpose of pursuing such a course of study,'" *id.* (emphasis added by Judge Henderson)—the dissenting opinion states that

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[4] Judge Henderson agreed with the panel majority only on Petitioner's standing to sue. *See* Pet. App. 60a.

> [i]n view of the language itself, the specific context in which that language is used, and the broader context of the statute as a whole . . . "student" and "course of study" cannot reasonably be read to include post-completion OPT.

Id. 74a. Similarly, the dissenting opinion argues that interpreting the F-1 provision's phrase "'seeks to enter' as an entry-only requirement effectively removes any statutory constraint on the DHS's authority after admission." *Id.* 78a.

Judge Henderson's dissent also observes that

> the DHS interpretation has led to post-completion OPT rivaling the H-1B visa as the largest highly skilled guest worker program. Indeed, in 2016, the year in which the DHS authorized the twenty-four-month STEM extension, post-completion OPT surpassed the H-1B visa program as the greatest source of highly skilled guest workers. This makes the DHS interpretation even more unlikely given the long history of statutory caps on the number of H-1B visas.

Id. 79a (citation omitted); *see* 8 U.S.C. § 1101(a)(15)(H)(i)(b) (referring to "an alien . . . who

is coming temporarily to the United States to perform services . . . in a specialty occupation").[5]

3. Judge Rao's dissent from denial of rehearing en banc argues that "the panel's interpretation of the F-1 student visa provision cannot be reconciled with the text and structure" of the INA. Pet. App. 279a.

According to Judge Rao,

> [t]he panel opinion turns Congress's carefully calibrated scheme on its head. The INA enumerates 22 categories of "nonimmigrants" who may be eligible for visas to come to the country temporarily, with many categories further divided into specific subcategories. *See* 8 U.S.C. §§ 1101(a)(15)(A)–(V). The nonimmigrant categories are precisely delineated,

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[5] Although Judge Henderson concluded that her interpretation of the F-1 provision necessitates "reversal of the district court," Pet. App. 69a, she would have remanded for further consideration of whether 8 U.S.C. § 1324a(h)(3) vests DHS with "independent authority to authorize the employment of any alien." *Id.* 82a. Section 1324a (Unlawful employment of aliens) makes it unlawful to knowingly hire an "unauthorized alien." Subsection (h)(3) of § 1324a defines "unauthorized alien" as an alien who is not "lawfully permitted for permanent residence" or "authorized to be so employed by this chapter or [DHS]." According to the majority opinion, this definition's "express recognition that aliens 'may be authorized to be . . . employed . . . by' DHS confirms that Congress has deliberately granted the Executive power to authorize employment." Pet. App. 54a. "[I]n assessing section 1324a(h)(3) authority," Judge Henderson "would instruct the district court to decide whether F-1 status is severable from the post-completion OPT program." *Id.* 84a.

> reflecting Congress's judgments as to which aliens may be admitted into the country and for what reason.
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> * * *
>
> These provisions exemplify Congress's detailed attention to the very specific conditions that attach to each nonimmigrant visa. Nonetheless, the panel concludes such statutory requirements apply only at the moment of entry. . . . Although Congress has set out the conditions for entry, the panel draws the surprising conclusion that DHS may prescribe different criteria for staying in the United States.
>
> Under the majority's approach, DHS is left with wide discretion to determine which aliens may remain in the country even after the grounds for their visa have lapsed. The only constraint identified by the panel is that an extended stay must be "reasonably related" to the particular visa category.

Id. 280a-281a; *see also id.* 281a-282a ("Glossing over Congress's delineation of dozens of discrete categories, the majority's interpretation effectively erases the INA's very specific requirements the moment an alien enters the United States.").

Citing Judge Henderson's panel dissent, Judge Rao argues that "there is not even a plausible textual basis for DHS to allow student visa holders to remain in the

country and work long after their student status has lapsed." *Id.* 283a. She contends that "the majority's argument to the contrary rests on a fundamental misreading of the statute." *Id.*

Judge Rao contends that the INA provision that the majority identifies as DHS's source of authority for creation of the Post-Completion STEM OPT program, 8 U.S.C. § 1184(a)(1), "is not about post-arrival requirements" and "does not provide authority for DHS to allow F-1 visa holders to stay and work in the United States for years after they are no longer students." *Id.* 283a, 284a. In her opinion "DHS's regulatory authority to set time and conditions applies only to 'admission.'" *Id.* at 283a (quoting § 1184(a)(1)). "If there were any doubt about the plain meaning of the term, 'admission' is explicitly defined as 'the lawful *entry* of the alien into the United States.'" *Id.* (quoting 8 U.S.C. § 1101(a)(13)(A) (emphasis added by Judge Rao)). Judge Rao asserts "[i]t is therefore quite clear that section 1184(a)(1) allows DHS to prescribe regulations that govern aliens' entry into the country, but does not provide independent authority for expanding 'post-arrival' stays and work authorization." *Id.*

4. The majority opinion appears to be the only appellate decision holding that although § 1101(a)(15) establishes specific statutory requirements for temporary admission of various classes of nonimmigrant aliens, § 1184(a)(1), a general provision, authorizes DHS to determine, by regulation, the "time" and "conditions" governing nonimmigrants' work and/or stay after they enter the

United States. According to the panel majority, § 1101(a)(15) merely provides a "tether" or "guide" for exercise of DHS's post-entry regulatory authority. Pet. App. 3a, 25a.

Judge Rao's dissent from denial of rehearing en banc argues that the majority opinion's "surprising" bifurcation of the INA—*i.e.*, Congress' detailed statutory criteria governing nonimmigrant aliens' *entry* into the United States, but a general grant of authority allowing DHS to promulgate additional or different criteria governing nonimmigrants' *stay* (and possibly work) in the United States—conflicts with a well-established body of case law. *See* Pet. App. 285a ("[T]he Supreme Court and other circuits have consistently held nonimmigrant visa holders must satisfy the statutory criteria both at entry and during their presence in the United States.") (collecting cases); *see also* Pet. at 16-18.

For example, in *Elkins v. Moreno*, 435 U.S. at 666, this Court explained that a nonimmigrant alien "who does not maintain the *conditions attached to his status* can be deported" (emphasis added); *see* 8 U.S.C. § 1227(a)(1)(C)(ii) (Nonimmigrant status violators) ("Any alien who was admitted as a nonimmigrant and who has *failed to maintain* the nonimmigrant status in which the alien was admitted . . . or to comply with the conditions of any such status, is deportable.") (emphasis added).

The Court observed in *Elkins* that for some categories of nonimmigrant aliens—including specifically F-1 students—one such condition, derived *directly* from certain subsections of § 1101(a)(15), is

that they have "no intention of abandoning" their own country. 435 U.S. at 665 (quoting § 1101(a)(15)(F)(i)). In other words, "if their real purpose in coming to the United States was to immigrate permanently," they can be deported. *Id.* The Court thus confirmed that the statutory conditions set forth in § 1101(a)(15) for admission of nonimmigrant aliens, including for F-1 students, continue to "attach" *after* they enter the United States. *See also Toll v. Moreno*, 458 U.S. 1, 14 (1982) ("For many of these nonimmigrant categories, Congress has precluded the covered alien from establishing domicile in the United States.") (citing § 1101(a)(15)(F)); *Khano v. INS*, 999 F.2d 1203, 1207 (7th Cir. 1993) ("Once the INS determined that the [F-1 student] failed to maintain his status as a full-time student — the condition attached to his nonimmigrant status — it instituted deportation proceedings before the immigration judge.") (citing *Elkins,* 435 U.S. at 665); *id.* at 1207 n.2 (quoting § 1101(a)(15)(F)(i)). Section 1184(a)(1) itself authorizes DHS to require "the giving of a bond with sufficient surety . . . to insure that . . . upon *failure to maintain the status* upon which [the nonimmigrant alien] was admitted . . . such alien will depart from the United States" (emphasis added).

Contrary to the foregoing authority, and quoting *Rogers v. Larson*, 563 F.2d 617, 622-23 (3d Cir. 1977), a pre-*Elkins* decision, the majority opinion states that "F-1 identifies entry conditions but 'is silent as to any controls to which these aliens will be subject after they arrive in this country.'" Pet. App. 6a. Judge Rao's dissent notes, however, that the *Rogers* "opinion

nowhere stated the nonimmigrant requirements apply only at entry," and that "the Third Circuit has subsequently interpreted a nonimmigrant visa provision as imposing ongoing conditions during an alien's presence in the United States." Pet. App. 284a-285a n.2 (citing *Graham v. INS*, 998 F.2d 194, 196 (3d Cir. 1993)).

Judge Rao's dissent correctly predicted that the majority opinion's "capacious standard" under which "aliens may remain in the country even after the grounds for their visas have lapsed . . . could distort other nonimmigrant categories." *Id.* 281a; *see Save Jobs USA v. DHS*, 2023 WL 2663005 at *2, *3 (D.D.C. Mar. 28, 2023) (rejecting plaintiff's contention that "that Congress has never granted DHS authority to allow foreign nationals, like H-4 visa-holders, to work during their stay in the United States . . . The D.C. Circuit's holding and reasoning in *Washtech* apply with equal force in this case.").

The Court's intercession is needed both to decide whether the majority opinion can be reconciled with *Elkins* and its progeny, and to address the inter-circuit conflict that the majority opinion has created on the fundamental question of whether the nonimmigrant admission conditions expressly set forth in § 1101(a)(15) continue to apply following entry into the United States.

B. This is a "major questions" case

The major questions doctrine "refers to an identifiable body of law that has developed over a series of significant cases all addressing a particular

and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted." *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022). Under the major questions doctrine, the Court

> presume[s] that Congress intends to make major policy decisions itself, not leave those decisions to agencies. . . . Thus, in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make [the Court] reluctant to read into ambiguous statutory text the delegation claimed to be lurking there. To convince [the Court] otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to clear congressional authorization for the power it claims.

Id. (internal quotation marks and citations omitted).

The Post-Completion OPT program, especially the "STEM extension" work authorization for F-1 student visa holders, reflects a constellation of major policy decisions made by DHS, not Congress. According to the majority opinion, which nowhere cites *West Virginia v. EPA*, "OPT continues the Executive's longstanding policy of authorizing visiting students to work here in their field, under the auspices of their school, for a limited period to cement their classroom learning and ensure they can use that knowledge effectively at work when they return to their home

countries." Pet. App. 11a-12a. Further, DHS asserts that the STEM OPT program "will also benefit the U.S. educational system, U.S. employers, and the U.S. economy." 81 Fed. Reg. at 13,043. More specifically, DHS contends that the program

> will benefit the U.S. educational system by helping to ensure that the nation's colleges and universities remain globally competitive in attracting international students in STEM fields. U.S. employers will benefit from the increased ability to rely on skilled U.S.-educated STEM OPT students, as well as their knowledge of markets in their home countries. The nation also will benefit from the increased retention of such students in the United States, including through including through increased research, innovation, and other forms of productivity that enhance the nation's economic, scientific, and technological competitiveness.

Id.

But there also are important countervailing policy considerations. For example, in its discussion of Petitioner's standing, the majority opinion holds that Washtech's members "are direct and current competitors with OPT participants," that they have suffered "cognizable injury" in the form of "exposure to increased competition in the STEM labor market," and that this injury is "traceable to the practical training rule." *Id.* 21a, 22a; *see also Wash. All. of Tech. Workers v. DHS*, 892 F.3d 332, 341 (D.C. Cir.

2018) ("The increase in competition is directly traceable to the DHS because the DHS's regulations authorize work for the OPT participants with whom Washtech members compete for jobs.")

Citing *West Virginia v. EPA*, Judge Rao's dissent argues that "[t]he INA's provisions for work visas reflect political judgments balancing the competing interests of employers and American workers. Such detailed legislation is incompatible with assuming a broad delegation to DHS to confer additional work visas through regulation." *Id.* 282a.

Judge Rao's dissenting opinion explains that under the major questions doctrine, "'extraordinary grants of regulatory authority' require not 'a merely plausible textual basis for the agency action' but 'clear congressional authorization.'" *Id.* 282a-283a (quoting *West Virginia*, 142 S. Ct. at 2609). Although the majority opinion points primarily to § 1184(a)(1) as the source of DHS authority for promulgation of the STEM OPT program, *id.* 23a, Judge Rao does not find "even a plausible textual basis" for the program. *Id.* 283a; *see also id.* 69a-87a (Judge Henderson's detailed textual analysis of § 1101(a)(15)(F)). Judge Henderson agrees that this "may be a major question" case. *Id.* 81a n.11; *see also id.* 86a-87a ("[L]ike the EPA's asserted authority in *West Virginia* . . . the limit of DHS's asserted authority is unclear.").

In view of the heavily utilized, policy-driven, STEM OPT guest worker program at issue, and the lack of a specific INA provision clearly authorizing F-1 students to work in the United States after receiving their degrees, the potential role of the major questions

doctrine in addressing the program's validity is another significant reason why the Court should grant review. If the Court were to hold, in accordance with the major questions doctrine and the separation of powers, that the Post-Completion STEM OPT program embodies major policy decisions that Congress would not (or should not) have intended to delegate to DHS, Congress has the power to amend the INA and explicitly authorize post-completion STEM OPT.

C. The statutory interpretation issue is important

The validity of the Post-Completion STEM OPT program is enormously important to the tens of thousands of F-1 students who seek to work in the United States after receiving their degrees, to the many U.S. technology-sector employers who depend on their availability, and to the highly educated American professionals who compete against them for STEM-related employment.

It is important to understand that the number of nonimmigrant aliens holding H-1B "specialty occupation" visas is capped "to protect similarly employed U.S. workers from being adversely affected by the employment of the nonimmigrant workers." U.S. Dep't of Labor, Wage & Hour Div., H-1B Program;[6] *see* 8 U.S.C. § 1184(g)(1)(A)(vii) (capping issuance of H-1B visas at 65,000 per fiscal

[6] https://www.dol.gov/agencies/whd/immigration/h1b (last visited Apr. 26, 2023).

year). But there is no such statutory (or regulatory) cap for F-1 student visa holders working in the United States under the Post-Completion STEM OPT program. For example, during the 2019 fiscal year, DHS issued almost 70,000 post-graduate STEM OPT employment authorizations, mostly for nonimmigrant aliens from India and China. *See* David J. Bier, Cato Inst., *The Facts about Optional Practical Training (OPT) for Foreign Students* (May 20, 2020).[7]

As noted above, Judge Henderson's panel dissent observes that "the DHS interpretation has led to post-completion OPT rivaling the H-1B visa as the largest highly skilled guest worker program." Pet. App. 79a. And Judge Rao's dissenting opinion argues that "[a]llowing F-1 students to work does an end run around numerical limits for skilled workers." *Id.* 282a; *see also* Darren Mayberry, *The F-1/H-1B Visa Contradiction: Uncle Sam Wants Your Tuition, but Not Your Expertise or Your Tax Dollars,* 38 J.L. & Educ. 335, 339 (2009) ("STEM F-1 visa holders are permitted to be employed, ostensibly for practical training but actually as *de facto* employees . . . .").

Further, although the Post-Completion STEM OPT program is limited to 3 years, it is a source of permanent employment in the United States for many F-1 student visa holders. "The F-1 category . . . is a vehicle by which many international students enter the United States, earn an education, find employment in the United States, and eventually

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[7] Available at https://www.cato.org/blog/facts-about-optional-practical-training-opt-foreign-students.

immigrate to the United States permanently." Sean Ashoff, *F-1 Student Visas and the Student Debt Crisis*, 39 J.L. & Com. 95, 98 (2020). DHS noted when promulgating the original OPT STEM extension that "[m]any employers who hire F-1 students under the OPT program eventually file a petition on the students' behalf for classification as an H–1B worker in a specialty occupation." 73 Fed. Reg. 18,944, 18,946 (Apr. 8, 2008). The 2016 Rule includes a "Cap-Gap extension provision, under which DHS temporarily extends an F-1 student's duration of status and any current employment authorization if the student is the beneficiary of a timely filed H-lB petition and change-of-status request pending with or approved by [DHS]." 81 Fed. Reg. at 13,042.

The question presented has even broader significance because, as Judge Rao's dissent emphasizes, the D.C. Circuit's majority opinion "explicitly recognizes that it applies to all nonimmigrant categories." *Id.* 280a. The majority opinion asserts, for example, that "*[l]ike other visa classes defined in section 1101(a)(15)*, F-1 identifies entry conditions but is silent as to any controls to which these aliens will be subject after they arrive in this country." Pet. App. 6a (internal quotation marks omitted) (emphasis added). Department of State statistics indicate that during fiscal year 2022, more than 6.8 million visas were issued to all nonimmigrant categories. *See* U.S. Dep't of State, Report of the Visa Office 2022, Table 1.[8] The D.C. Circuit's majority

[8] Available at https://tinyurl.com/42tt8dvb.

opinion affords DHS broad, independent regulatory authority over all nonimmigrant visa holders.

Although the majority opinion rejects Petitioner's opening-the-"floodgates warning," Pet. App. 49a, Judge Rao, joined by Judge Henderson, maintain that

> the panel decision has serious ramifications for the enforcement of immigration law. In holding that the nonimmigrant visa requirements are merely conditions of entry, the court grants [DHS] virtually unchecked authority to extend the terms of an alien's stay in the United States. This decision concerns not only the large number of F-1 visa recipients, but explicitly applies to all nonimmigrant visas and therefore has tremendous practical consequences for who may stay and work in the United States. By replacing Congress's careful distinctions with unrestricted Executive Branch discretion, the panel muddles our immigration law and opens up a split with our sister circuits. *This is a question of exceptional importance* . . . .

Id. 279a (emphasis added).

The Court should grant review in this case because it presents an important statutory construction issue that has far-reaching, multifaceted, national and international significance.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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